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In the Matter of	:	
PATRICK R. WHITE	:	Date: August 12, 1994
	:	:
Complainant	:	Case No.: 93-STA-28
	:	
v.	:	
"Q" TRUCKING COMPANY	:	
ALLIANCE TRUCKING	:	
	:	
and	:	
EMPLOYMENT SERVICES OF MICHIGAN	:	
	:	
Respondents	:	
.....	:	

RECOMMENDED DECISION AND ORDER DISMISSING COMPLAINT

This proceeding arises under the Surface Transportation Assistance Act of 1982, 49 U.S.C. app. § 2305 (1988). The case arose in this office following the issuance of a determination by the Regional Administrator, Occupational Safety and Health Administration that the complaint of discrimination filed by Patrick R. White had no merit. Mr. White appealed that determination to this office for hearing.

On August 8, 1994, counsel for the respondents filed a Motion for Sanctions based upon the complainant's non-compliance with discovery and pre-trial orders. As authority for the motion, the respondents rely upon the provisions of 29 C.F.R. § 18.6(d)(2)(v). The respondents request that the complaint of Patrick R. White be dismissed, or in the alternative, that other sanctions be imposed based upon his having failed to comply with my prior orders. The respondents also request that Mr. White be taxed for the costs and reasonable attorney fees required to file the Motion to Dismiss.

During its pendency in the Office of the Administrative Law Judges, the following events have occurred:

June 18, 1993	Notice of Hearing and Pre-hearing Order issued - The Order establishes a Pre-hearing exchange procedure and sets forth the guidelines for the stipulation
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of documents and for the conclusion of  
discovery. The Notice clearly advises

the complainant that failure to timely comply with the pre-hearing order without good cause may result in the dismissal of the proceeding.

June 23, 1993	Order - A stipulation of facts form is directed to each of the parties.
June 23, 1993	Order - A copy of the Rules of Practice and Procedure for administrative hearings before the Office of Administrative Law Judges was mailed to the complainant. Mr. White was urged to obtain attorney representation and it was pointed out to him that the procedural guidelines define the parameters for discovery in these proceedings.
August 6, 1993	Order of Postponement - Based upon the request of complainant's attorney, a postponement was granted since Mr. White had only retained new counsel approximately fifteen days from the date of the request and less than a month before the matter was scheduled for hearing. The Order of Postponement notes that the matter will be rescheduled for hearing within a short period of time; that proper notice would be provided to each of the parties; and that it was expected that the parties would continue the discovery process during the interim.
September 2, 1993	A second Notice of Hearing and Pre-hearing Order were issued. The earlier pre-hearing orders were made applicable to the second Notice of Hearing and a discovery conclusion date was set. This Notice served to remind complainant that a dismissal could result if timely compliance with the pre-hearing order was not made.
November 2, 1993	Memorandum of Telephone Conference - Preliminary to the scheduled hearing, I attempted to identify the documentary materials and also the issues involved in the case. Representatives of two of the respondents were told that the case would not be postponed but rather would proceed to hearing.

November 3, 1993 Case called for hearing in Lansing, Michigan - One of the respondents moved for postponement and that request was summarily denied. (Tr. 8) Counsel for the complainant opposed the postponement request. Due to a procedural problem which arose at the hearing, the respondent moved that the case be remanded for further investigation of employment facts to determine if more than one employer was potentially liable. The complainant voiced no objection to the remand request.

November 18, 1993 Complainant's attorney sends a letter advising that he no longer represents Patrick White and that his withdrawal is being done upon agreement between himself and Mr. White. He represents that Mr. White was "currently in the process of obtaining substitute counsel."

March 7, 1994 Secretary of Labor - Order of Remand - Case is remanded for a de novo hearing and to afford the complainant an opportunity to prove the liability of each respondent.

May 16, 1994 Notice of Hearing and Pre-hearing Order issued - It is directed that certain information be exchanged prior to the hearing, that a stipulation of documents occur and that discovery be concluded by July 26, 1994. The pre-hearing order warns that "failure to timely comply with this pre-hearing order without good cause may result in the dismissal of the proceeding or the imposition of other appropriate sanctions against the non-complying party."

May 19, 1994 Notice of Mailing issued - Certain documents were mailed to the complainant following a request by Mr. White. The parties were placed upon notice that the time deadlines stated in the Notice of Hearing will be strictly enforced. The parties were also advised that no request for postponement will be entertained and it was expected that all parties will be prepared to go to trial on August 16, 1994.

July 14, 1994	Complainant requests postponement in order for him to find substitute legal counsel. His written statement indicates that he will need at least 90 days to find legal representation and to prepare them for the case.
July 19, 1994	Order - Complainant's request for postponement is denied for multiple reasons but primarily because the parties had been advised on numerous occasions that this case would not again be postponed.
July 26, 1994	Order - In response to a respondent's Motion to Compel Complainant to Respond to Interrogatories and a request for production of documents, it was ordered that "Patrick White will comply in all respects with the discovery requests of the respondents no later than fifteen days from the date of this Order. Mr. White is directed to fully answer the Interrogatories previously served upon him; attach any and all documents previously requested in the respondents' request for production; and supply those documents including Mr. White's tax records within the time stated."

The procedural rules at 29 C.F.R. § 18.6 applicable to this case provide in part as follows:

(d) Motion for order compelling answer: sanctions.

(1) A party who has requested admissions or who has served interrogatories may move to determine the sufficiency of the answers or objections thereto. Unless the objecting party sustains his or her burden of showing that the objection is justified, the administrative law judge shall order that answer be served. If the administrative law judge determines that an answer does not comply with the requirements of these rules, he or she may order either that the matter is admitted or that an amended answer be served.

(2) If a party or an officer or agent of a party fails to comply with a subpoena or with an order, including, but not limited to, an order for the taking of a deposition, the production of documents, or the answering of interrogatories, or requests for admissions, or any other order of the administrative law judge, the administrative law judge, for the purpose of permitting

resolution of the relevant issues and disposition of the proceeding without unnecessary delay despite such failure, may take such action in regard thereto as is just, including but not limited to the following:

(i) Infer that the admission, testimony, documents or other evidence would have been adverse to the noncomplying party;

(ii) Rule that for the purposes of the proceeding the matter or matters concerning which the order or subpoena was issued be taken as established adversely to the non-complying party;

(iii) Rule that the non-complying party may not introduce into evidence or otherwise rely upon testimony by such party, officer or agent, or the documents or other evidence, in support of or in opposition to any claim or defense;

(iv) Rule that the non-complying party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence should have shown.

(v) Rule that a pleading, or part of a pleading, or a motion or other submission by the non-complying party, concerning which the order or subpoena was issued, be stricken, or that a decision of the proceeding be rendered against the non-complying party, or both.

The respondents contend in their motion that this case ought to be dismissed since Mr. White has continually failed to comply with direct orders of the Administrative Law Judge in a variety of ways. The complainant has refused to stipulate facts or documents as directed in the pre-hearing order, he has wholly failed to comply with the discovery directives contained in the Administrative Law Judge's Order entered on July 26, 1994, he has made no pre-hearing exchange, and he has essentially failed to pursue his complaint.

Mr. White, by letter dated August 5, 1994, responded to the Motion for Sanctions filed by the respondents. Mr. White contends that the Interrogatories were being answered and that they would be in the hands of the attorneys by August 8 or 9, 1994. Mr. White once again requests that the case be postponed since he does not have attorney representation. The Motion for Sanctions filed by the respondents was received in this office on August 8, 1994. The motion was supplemented by letter dated August 10, 1994 in which counsel for the respondents advised that as of 4:55 p.m. on August 10, 1994, they had not received any Interrogatory responses or documents from Patrick White. August 10, 1994 is

the fifteenth day from the date of my Order compelling a response by Mr. White. Mr. White's response by letter dated August 5, 1994, is received as a direct response to the respondents' Motion for Sanctions and its content I believe would be the same to an Order to Show Cause had one been issued in response to the Motion for Sanctions.

The record of this case discloses multiple delinquencies by the complainant. In my Order of June 23, 1993, I urged him to obtain legal representation. Mr. White waited until less than thirty days prior to the original scheduled hearing date within which to retain an attorney, and therefore, caused a postponement of his original scheduled hearing. The respondents sought postponement of the second scheduled hearing which I denied. Complainant's original counsel withdrew on November 18, 1993, and therefore, he has had almost nine full months within which to obtain attorney representation. Now at the last minute, he once again in dilatory fashion seeks a postponement to obtain legal counsel when in fact he has been advised on numerous occasions that this case would not again be postponed. He clearly has been dilatory in pursuing his complaint.

The Notice of Hearing gives specific direction that at least ten work days prior to the scheduled hearing date the parties were to take certain action including the preparation of a stipulation of facts, the submission of a witness list, a stipulation of documents and the conclusion of discovery was noted for July 26, 1994 in order to permit the parties an opportunity to prepare their case for trial after having developed all pertinent facts. Mr. White has complied with none of those directives. In fact, the affidavit of counsel for the respondent which was attached to the Motion for Sanctions indicates that Mr. White had agreed to meet with the attorneys in order to prepare a stipulation but that he had telephoned fifteen minutes prior to the scheduled meeting and indicated that he had "mechanical problems" with his vehicle and could not attend but that he "might" bring some documents by the next day. On the following day, the attorney was once again telephoned by Mr. White and advised that he would not be providing all of the information requested. In fact, as noted in counsel's letter of August 10, 1994, counsel for the respondents have received no Interrogatory responses or documents from Mr. White.

This record shows that even though Mr. White is not represented by counsel, this is his case and he is under an obligation to pursue it. Many months ago, I mailed to him a copy of the Rules of Practice and Procedure for hearings before this office and noted that those rules contained the discovery guidelines. In my Order of August 6, 1993, I indicated that discovery should continue even though the case was being postponed. In my Notice of Mailing issued on May 19, 1994, all parties were advised that the time deadlines would be strictly enforced. Finally, in my

Order of July 26, 1994, Mr. White was directed to comply in all respects with the discovery requests. He has complied with none of those requests, and in addition, he has wholly failed to respond in any way to my Pre-hearing Order.

Mr. White has had every opportunity to at least comply in part with the pre-hearing and discovery directives. He has refused to do that. He could have sought an extension of time within which to file responses to the discovery directives. Instead, he indicated partial compliance would be made at a future date, but he even defaulted in that regard. For the second time, he has failed to obtain attorney representation in a timely fashion and seeks now to once again delay the processing of this case. He has previously been advised in each of the three Notices of Hearing that dismissal of this proceeding was possible if he failed to comply with the pre-hearing directives. The administrative record contains multiple orders issued by me emphasizing the importance of stipulating facts and documents and engaging in the discovery process in a timely fashion. Mr. White has seen fit to ignore my directives and also the earlier warnings concerning possible dismissal. As the respondents note in their recent submissions, their preparation for trial has been impaired because of the complainant's refusal to cooperate. The complainant's conduct in that regard frustrates the orderly and expeditious disposition of cases and I believe necessitates the imposition of sanctions. The complainant's half-hearted attempt to pursue a complaint under this Act cannot be tolerated.

Based upon this record, I believe that the complainant's refusal to take any steps to comply with my Orders and his other dilatory tactics demonstrate a pattern of contumacious conduct which is sufficient grounds for dismissing the complaint. Consolidation Coal Co. v. Gooding, 703 F.2d 230 (6th Cir. 1983). The respondents urge that this case be dismissed based upon authority conferred by 29 C.F.R. § 18.6(d)(2)(v). I wholly agree. The complainant has failed to respond to the Orders issued by the Administrative Law Judge and to the attempts by counsel for the respondent to properly prepare this case for hearing. I believe it is reasonable to assume that the complainant no longer desires to prosecute this claim and as the respondents point out in their motion, it is unfair to them to be required to proceed to trial without the complainant fully complying with their discovery requests.

In view of the above, IT IS RECOMMENDED that this case be dismissed pursuant to authority contained within 29 C.F.R. § 18.6(d)(2). Cohen v. Roberts Express, Case No. 91-STA-29, Sec. Final Dec. and Order, Feb. 11, 1992; Walters and Strode v. Karmichael Tank Service, Case No. 90-STA-12, Acting Sec. Final Dec. and Order, Jan. 22, 1991.



The respondents also seek costs and reasonable attorney fees expended in the preparation of the Motion for Sanctions. However, the Secretary has concluded that the Department has not elected to assert any inherent authority to impose costs in a whistleblower proceeding. Billings v. Tennessee Valley Authority, Case No. 89-ERA-16-25, 90-ERA-2-8-18, Sec. Final Dec. and Order, July 29, 1992. Therefore, the respondents requests for costs are hereby denied.

The hearing presently scheduled to commence at 9:00 a.m. on August 16, 1994 in Lansing, Michigan is hereby cancelled.

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RUDOLF L. JANSEN  
Administrative Law Judge